

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jamie Davis,

Plaintiff,

v.

Diversified Consultants, Inc., and
DOES 1-10, inclusive,

Defendants.

Civil Action No. 13-10875-FDS

**OPPOSITION OF DIVERSIFIED CONSULTANTS, INC. TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

The plaintiff has moved for partial summary judgment on his Telephone Consumer Protection Act ("TCPA") claim. The Motion for partial summary judgment is not based on undisputed facts, and the relief that plaintiff requests is not required by governing law. The Motion should be summarily denied.

DISPUTED FACTS

7. Disputed. Calls are placed by LiveVox using its system. DCI merely provides the numbers. (Pye Affidavit ¶¶ 2-6)

22. Disputed. The disputed calls were not made by an automatic dialing system, and the plaintiff misinterprets the exhibit. (Pye Affidavit ¶¶ 2-6; Leszczynski Affidavit)

24-31. Disputed. DCI asserted affirmative defenses and answered interrogatories in good faith. DCI's affirmative defenses were asserted prior to the completion of discovery and the plaintiff's deposition. DCI's interrogatories were answered in good faith based on its understanding of the communication services provided by the independent entity LiveVox, applicable provisions of law,

and judicial authority indicating that the LiveVox system is not an automatic dialing system within the meaning of the TCPA. (Pye Aff. ¶ 6, Leszczynski Aff.)

ARGUMENT

1. DCI already has moved for summary judgment as to all counts of the complaint against it. DCI incorporates here all points and authorities made in that motion. For the reasons given by DCI in its motion for summary judgment, the plaintiff's motion for partial summary judgment must be denied.

2. The decision the plaintiff relies on, Echevvaria, is a non-final, District Court order on an interlocutory summary judgment motion. It is still subject to appeal. It is not the law of the Second Circuit, let alone this Circuit. Further, it is incorrect and represents poor policy for the reasons given by DCI in its summary judgment motion.

3. In any event, material facts are in dispute. The subject calls were made not by DCI, but by an independent contractor. Further, the plaintiff's allegations as to the number of calls, DCI's intent and conduct in connection with the placement of the calls by LiveVox, and the plaintiff's alleged statutory damages are all contradicted by the sworn evidence offered by DCI. (Leszczynski Affidavit; Pye Affidavit)

CONCLUSION

For all the foregoing reasons, the plaintiff's motion for partial summary judgment should be denied.

DIVERSIFIED CONSULTANTS, INC.
By Its Attorneys,

/s/ John J. O'Connor

John J. O'Connor

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CERTIFICATE OF SERVICE

I do hereby certify, that on April 28, 2014, served the within document, by causing a copy thereof, to be sent electronically to the registered participants in this case, if any, as identified on the Notice of Electronic Filing (NEF) and paper copies mailed, first class mail, postage prepaid to any non-registered participants in this case.

/s/ John J. O'Connor

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